RECORD AND I BRIEFS,

No. 15-1031

FILED
FEB 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOHN HOWELL,

Petitioner,

v.

SANDRA HOWELL,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR RESPONDENT

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner and Respondent agreed prior to divorce that Respondent was entitled to fifty percent of Petitioner's military retirement pay, and the decree so awarded. Petitioner later elected to receive veterans' disability benefits and waived an equal amount of retirement pay, consequently reducing Respondent's vested interest. Does the Uniformed Services Former Spouses' Protection Act preempt the state court's enforcement or modification of a stipulated decree in order to indemnify Respondent and avoid depriving her of vested property without due process?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE PRESUMPTION AGAINST PRE-EMPTION OF STATE FAMILY LAW REMAINS APPLICABLE DESPITE *MCCARTY*, THE USFSPA, AND *MANSELL*	9
II. THE PRESUMPTION AGAINST PRE-EMPTION STANDS UNREBUTTED	12
A. Conflict pre-emption principles impose a stringent standard	12
B. Here there is no conflict of federal and state law	14
1. Agreements between spouses to divide MRP do not conflict with the USFSPA	14
2. Indemnification orders do not conflict with the purposes and objectives of the USFSPA	20
(a) The primary purpose is to benefit the non-military spouse	20
(b) No conflict exists	22

TABLE OF CONTENTS – Continued

Page

(c) *Wissner*, *Ridgway*, *Hisquierdo*, and *Hillman* are not controlling 25

III. THE USFSPA DISTINGUISHES BETWEEN DIVISIONS OF MRP MADE BEFORE AND AFTER A WAIVER OF MRP..... 27

IV. STATE COURTS MUST HAVE FLEXIBILITY TO FASHION EQUITABLE REMEDIES APPROPRIATE TO EACH CASE..... 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES:

Abernathy v. Fishkin, 699 So.2d 235 (Fla. 1997) 17

Ablamis v. Roper, 937 F.2d 1450 (9th Cir. 1991).....10

Barker v. Kansas, 503 U.S. 594 (1992) 28

Boggs v. Boggs, 520 U.S. 833 (1997) 13

Franz v. United States, 712 F.2d 1428 (D.C. Cir. 1983) 10

Gatfield v. Gatfield, 682 N.W.2d 632 (Minn. App. 2004) 17

Gobeille v. Liberty Mut. Ins. Co., 136 S.Ct. 936 (2016) 11

Hayward v. Hayward, 868 A.2d 554 (Pa. Super. Ct. 2005) 25

Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996).....25

Hillman v. Maretta, 133 S.Ct. 1943 (2013)..... 10, 12, 13, 25, 26

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)..... 12, 13, 25, 26, 27

In re Burrus, 136 U.S. 586 (1890).....10

In re Marriage of Stone, 274 Mont. 331, 908 P.2d 670 (1995) 17

Krapf v. Krapf, 439 Mass. 97, 786 N.E.2d 318 (2003) 17, 25

Mansell v. Mansell, 490 U.S. 581 (1989) .....*passim*

McCarty v. McCarty, 453 U.S. 210 (1981) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

McHugh v. McHugh, 124 Idaho 543, 861 P.2d 113 (App. 1993) 25

Owen v. Owen, 14 Va. App. 623, 419 S.E.2d 267 (1992) 25

Ridgway v. Ridgway, 454 U.S. 46 (1981) 25, 26

Rose v. Rose, 481 U.S. 619 (1987) 13, 22

Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038 (7th Cir. 1983) 10

Shelton v. Shelton, 119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*, 541 U.S. 960 (2004) 16

Sosna v. Iowa, 419 U.S. 393 (1975) 10

Troxell v. Troxell, 28 P.3d 1169 (Okla. Civ. App. 2001) 25, 32

Whitfield v. Whitfield, 373 N.J. Super. 573, 862 A.2d 1187 (2004) 25

Wissner v. Wissner, 338 U.S. 655 (1950) 25, 26

STATUTORY PROVISIONS:

10 U.S.C. § 1072 21

10 U.S.C. § 1408 ..... *passim*

10 U.S.C. § 1447 21

10 U.S.C. § 1448 21

10 U.S.C. § 1450 21

10 U.S.C. § 3929 23

10 U.S.C. §§ 6325-6326 23

TABLE OF AUTHORITIES – Continued

Page

10 U.S.C. § 8929 23

38 U.S.C. §§ 5304-5305 3

45 U.S.C. § 231m 27

Pub. L. No. 97-252, Title X, §§ 1003-1005, 96 Stat. 730 (1982) 21

A.R.S. § 25-317 14

A.R.S. § 25-318.01 ..... 3, 4, 6

LEGISLATIVE MATERIALS:

H.R.Conf.Rep. No. 97-749 (1982) 20

S.Rep. No. 97-502 (1982) 20

OTHER AUTHORITIES:

Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. AM. ACAD. MATRIM. LAW. 147 (2011) 24

STATUTES INVOLVED

In addition to the provisions set out in the Brief of Petitioner, the following is also involved.

10 U.S.C. § 1408(e)(6)

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

STATEMENT OF THE CASE

Petitioner John Howell and Respondent Sandra Howell resided and divorced in Arizona. Pet. App. 39a. Arizona is a community property state.

At the time of their divorce they contemplated that John's retirement was imminent. Pet. App. 43a.

Accordingly, they *agreed* to equally divide John's forthcoming military retirement pay (MRP). Their agreement provided:

> [Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order.

Pet. App. 24a, 32a.

The Decree of Dissolution of Marriage entered on April 16, 1991 tracks the settlement agreement verbatim:

> [Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order.

Pet. App. 41a.

Sandra's apparent financial need entitled her to receive spousal maintenance from John. The Decree ordered him to pay maintenance until he retired and she began receiving her share of the community property MRP. Pet. App. 43a.

John retired from the Air Force in 1992 after a twenty-year career. Pet. App. 2a. Payment of MRP began in 1992. Pet. App. 24a.

In 2004, John voluntarily petitioned for Veterans Administration disability benefits. Pet. App. 24a, 32a. He received a retroactive disability rating of twenty percent in 2005. *Id.* Because federal law prohibits

duplication of MRP and disability benefits, *see* 38 U.S.C. §§ 5304-5305, John elected to waive MRP in an amount equal to his disability benefits of approximately $250 per month. Pet. App. 24a, 33a. Consequently, the amount of Sandra's share of MRP was reduced by one-half of the amount John waived. *Id.*

In 2013, Sandra moved to enforce the Decree's award of MRP and John moved to dismiss that motion. Pet. App. 31a. John *agreed* that Sandra had a *vested interest* in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Sandra's interest in the MRP. Pet. App. 35a.

John did not argue the intent of his agreement with Sandra to share his MRP equally. Specifically, he did not argue that the agreement allowed him to unilaterally reduce the dollar amount of Sandra's vested interest. *See* Pet. App. 31a-38a.

John argued, instead, that a post-decree enactment, A.R.S. § 25-318.01, overruled prior case law by prohibiting the modification of a property division to indemnify a veteran's spouse for a reduction in MRP related to the veteran's receipt of disability benefits. Pet. App. 31a-38a.

In ruling on the motions, the family court found:

- Sandra "had a vested property right in 50% of [John's] military retirement." Pet. App. 35a.
- "[Sandra] was dependent on and expecting this money." Pet. App. 33a.

- A.R.S. § 25-318.01 cannot be applied retroactively to vested property rights. Pet. App. 37a.
- John "had an obligation to pay [Sandra] 50% of the military retirement as ordered in the decree." Pet. App. 37a.
- John "violated the decree by unilaterally decreasing the retirement pay in favor of disability pay." Pet. App. 36a.
- "[John] owed [Sandra] 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." Pet. App. 37a.

Accordingly, John's motion to dismiss was denied, Pet. App. 37a, as was his motion for reconsideration. Pet. App. 29a.

After an evidentiary hearing to determine the amount John owed to Sandra, the family court "Ordered that [John] is responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability." Pet. App. 28a. That order did not direct how John was to comply. Specifically, it did not order him to pay from his disability benefits. John apparently did not make a record regarding his income and assets from which he could pay Sandra.

On appeal, John argued for the first time that the Uniformed Services Former Spouses' Protection Act (USFSPA) preempted the family court's authority to order him to indemnify Sandra. The Arizona Court of Appeals deemed the issue waived. Pet. App. 20a-20b.

The Arizona Supreme Court, however, considered it. Pet. App. 5a.

Observing that "Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of MRP" and that the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay," the Arizona Supreme Court concluded that "the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property." Pet. App. 7a.

Citing *Mansell*'s recognition that "domestic relations are preeminently matters of state law," and the corresponding requirement for positive evidence of preemption by direct enactment, the Arizona Supreme Court concluded:

> Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal prohibition.

Pet. App. 8a.

The Arizona Supreme Court therefore held "that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits." Pet. App. 14a.

Lastly, the Arizona Supreme Court ruled "Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John." Pet. App. 12a. In that circumstance, the inapplicability of A.R.S. § 25-318.01 was affirmed. The Arizona Supreme Court held that the statute "cannot be applied to prohibit the court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment." Pet. App. 14a. Otherwise, the statute would "diminish Sandra's vested property right in violation of the due process guarantee." *Id.*

SUMMARY OF ARGUMENT

This Court held in *McCarty v. McCarty*, 453 U.S. 210 (1981), that MRP was the personal entitlement of the service member and therefore not divisible upon divorce. The USFSPA was enacted to "reverse" *McCarty* by authorizing the States to treat MRP according to state law, and thereby protect the former spouses of service members. As defined in the USFSPA, divisible MRP excludes MRP that has been waived in order to receive veteran's disability benefits. Accordingly, this Court held in *Mansell v. Mansell*, 490 U.S. 581 (1989), "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 494-495.

In Arizona, MRP is community property. It is a form of deferred compensation earned during marriage and divisible upon divorce. When it is divided, whether by agreement or not, Arizona law provides that the family court's decree creates a vested property right to future payments that a veteran cannot later unilaterally and negatively affect. Pet. App. 1a.

John and Sandra Howell agreed to divide his MRP equally, and their divorce decree so ordered. Thirteen years later, John voluntarily sought to receive disability benefits. After an evaluation determined him to be twenty percent disabled, he elected to accept disability benefits. Doing so reduced his MRP dollar-for-dollar, and thereby reduced the payments to Sandra. On Sandra's motion to enforce the decree, the family court "Ordered that [John] is responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability." But, as the Arizona Supreme Court observed, the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay."

The regulation of domestic relations has traditionally been left to the States. There is therefore a presumption against pre-emption of state laws governing domestic relations. When Congress enacted the USFSPA, it did not expressly pre-empt the application of state law to the division of MRP. Instead, it explicitly authorized the division of MRP according to state law. It must therefore be presumed that state law regarding agreements to divide MRP, the nature of the property

interest created by an agreed or decreed division of MRP, and the enforcement or modification of decrees for the division of MRP is not pre-empted.

The issuance of a family court order requiring a veteran to indemnify a former spouse for a reduction in vested MRP after the veteran waives MRP to receive disability benefits, especially when the parties had agreed to the division of MRP, does not conflict with the purposes and objectives of the USFSPA. The primary purpose of the USFSPA to protect former spouses of veterans receiving MRP is actually furthered by such an order. And the order does not do "major damage" to any "clear and substantial" federal interest. Indeed, the only applicable federal interest – providing for the retired member – is not damaged because Congress has expressly authorized the division of MRP.

Finally, *Mansell* is not controlling and the indemnification order herein does not violate its holding. The MRP divided in *Mansell* included MRP that had already been waived to receive disability benefits. In other words, the spouse in *Mansell* had not acquired a vested interest in the waived MRP before the waiver.

ARGUMENT

I. THE PRESUMPTION AGAINST PRE-EMPTION OF STATE FAMILY LAW REMAINS APPLICABLE DESPITE *MCCARTY*, THE USFSPA, AND *MANSELL*.

Contrary to John's argument, resolution of this case requires consideration of the presumption against pre-emption of state domestic relations law. That is so for several reasons. First and foremost, there has been no express pre-emption. *McCarty* necessarily relied on conflict pre-emption principles. And the USFSPA does not expressly pre-empt state law. *See* 10 U.S.C. § 1408.

Second, *Mansell* did not reject "any presumption against preemption," as John asserts. Br. 37.

Third, neither did *Mansell*, as John further asserts, "h[o]ld that that federal law completely preempts *all state law* unless a federal statute affirmatively confers power on state divorce courts." *Id.*, emphasis added. Instead, *Mansell* narrowly held "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 494-495. That holding thus leaves room for the application of other aspects of domestic relations law.

When analyzing pre-emption, this Court has long recognized that the regulation of domestic relations is primarily left to the States. The rule has been consistently expressed for more than a century. "The whole subject of the domestic relations of husband and wife

. . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). "[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). "[D]omestic relations are preeminently matters of state law." *Mansell v. Mansell*, 490 U.S. at 587. "The regulation of domestic relations is traditionally the domain of state law." *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013). In other words, there is no "strong federal interest" in domestic relations and it is not "uniquely federal in nature."

"There is therefore a 'presumption against pre-emption' of state laws governing domestic relations. . . ." *Hillman*, 133 S.Ct. at 1950 (citation omitted). That presumption is buttressed by experience. This Court has "consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area [of domestic relations]." *Mansell*, 490 U.S. at 587, citing cases.

The presumption has been characterized as "strong." *Ablamis v. Roper*, 937 F.2d 1450, 1464 (9th Cir. 1991); *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1041 (7th Cir. 1983). Accordingly, the standard for pre-emption analysis in the context of domestic relations has been said to be "stringent." *Franz v. United States*, 712 F.2d 1428, 1435 (D.C. Cir. 1983) (Bork, J., concurring and dissenting).

Although *McCarty* held that the federal statutes then governing MRP prevented state courts from

treating it as community property, that holding is limited and did not settle the issue of pre-emption as to all aspects of domestic relations law that intersect the subject of MRP. Neither did the adoption of the USFSPA to authorize state courts to treat MRP as community property preclude any further consideration of the presumption against pre-emption. While the USFSPA is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *Mansell*, 490 U.S. at 587, it did not pre-empt the application of all state law in the context of MRP. John's comparison to *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936 (2016), is inapt because ERISA expressly pre-empts state law, even state law exercising a traditional state power.

Furthermore, the deference given by this Court to Congress regarding military matters does not negate the presumption against pre-emption of state domestic relations law. Instead, Congress has left the presumption intact by authorizing the States to treat MRP as community property and not expressly pre-empting the field of related family property laws.

For the same reason, the "history of significant federal presence" in military disability and retirement benefits does not eliminate the presumption against pre-emption of domestic relations law related to the authorized division of MRP. John's list of examples of Congressional "tinkering" with military benefits, Br. 40-42, does not support a different conclusion. To borrow a characterization made by then Justice

Rehnquist, John's argument is based on "vague implications from tangentially related enactments." *McCarty*, 453 U.S. at 237 (Rehnquist, J., dissenting).

For these reasons, the presumption against pre-emption still informs the pre-emption analysis in this case.

II. THE PRESUMPTION AGAINST PRE-EMPTION STANDS UNREBUTTED.

A. Conflict pre-emption principles impose a stringent standard.

There being no express pre-emption, conflict pre-emption principles govern herein. But it is overly simplistic to assert, as John does, that "State law is pre-empted to the extent of any conflict with a federal statute." Br. 14, quoting *Hillman*, 133 S.Ct. at 1949-1950. "Any conflict" is not to be taken literally. For example, "[a] mere conflict in words is not sufficient." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Therefore, what constitutes a pre-empting conflict must be examined. The sentence quoted above from *Hillman* is immediately followed by the explanation that "a conflict occurs when compliance with both federal and state regulations is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman*, 133 S.Ct. at 1949-1950 (internal quotes and citations omitted). Of those two tests, only a question of "purposes and objectives" pre-emption is raised herein.

The standard for determining whether state law conflicts with federal law, and is therefore pre-empted, is stringent and multi-faceted. As stated in *Hisquierdo*:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

439 U.S. at 581 (citations omitted).

Subsequent cases are in accord. *E.g.*, *Hillman*, 133 S.Ct. at 1950; *Mansell*, 490 U.S. at 587; *Rose v. Rose*, 481 U.S. 619, 625 (1987); *McCarty*, 453 U.S. at 220.

Furthermore, "[t]he approach [to pre-emption] must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control. * * * The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S. at 583.

Finally, "community property regimes . . . implement policies and values lying within the traditional domain of the States." *Boggs v. Boggs*, 520 U.S. 833, 840

(1997). Those "considerations inform [the] pre-emption analysis." *Id.*

B. Here there is no conflict of federal and state law.

1. Agreements between spouses to divide MRP do not conflict with the USFSPA.

The USFSPA does not pre-empt agreements between spouses to divide MRP. On the contrary, by authorizing the States to treat MRP as community property and divide it, Congress implicitly authorized spouses to agree on the division and necessarily authorized state courts to enforce or modify the ensuing decrees. That is of paramount importance herein because John and Sandra agreed to an equal division of MRP *before* he waived any MRP to receive disability benefits.[1] Therefore, John previously acknowledged that his agreement with Sandra gave her a vested interest in the MRP that he could not, under Arizona case law, unilaterally divest. Pet. App. 35a.[2]

---

[1] Settlement agreements are to be encouraged in domestic relations cases. Indeed, they are expressly promoted by statute in Arizona. A.R.S. § 25-317(A). Accordingly, they are binding on the court if they are fair. A.R.S. § 25-317(B). John has never contended that his agreement with Sandra was not fair.

[2] Sandra had a vested interest even without an agreement because, under Arizona law, the MRP was deferred compensation earned during marriage and therefore community property. The amount of her vested interest was established by the Decree, which created an immediate right to future payment. Pet. App. 12a-13a.

Given the history of federal deference to state law regulation of domestic relations, it follows that the subset of contracts between spouses regarding their family property is also within the protected domain of state law. In other words, state contract law in the domestic relations context is presumptively not preempted by federal legislation.

McCarty did nothing to affect contracts between spouses and the application of state law to them. It merely held that federal statutes then governing MRP prevented state courts from treating it as community property. Notably, *McCarty* did not involve an agreement between divorcing spouses to divide MRP. Instead of agreeing to divide MRP, the parties disputed whether Col. McCarty's MRP was his separate property, and therefore the issue was litigated and adjudicated. 453 U.S. at 217. *McCarty* did not void an agreement and did not hold that spouses could not agree to divide MRP like any other pension when divorcing.

Likewise, the USFSPA does not prohibit agreements between a service member and a spouse to divide MRP. The Act only "sought to change the legal landscape created by the *McCarty* decision." *Mansell*, 490 U.S. at 587. That new landscape merely prevented state courts from treating MRP as community property; it did not prevent contracts between spouses. Because *McCarty* did not affect contracts between spouses, neither did the USFSPA. Specifically, the USFSPA does not positively preclude an agreement for

the division of MRP made before any waiver to receive disability benefits.[3]

Although *Mansell* involved an agreement to divide MRP, its narrow holding does not prohibit all such agreements. The Mansells agreed to a division of "total military retirement pay," including MRP previously waived to receive disability benefits. The ensuing decree ran afoul of the USFSPA because it went too far by dividing disability benefits. However, *Mansell*'s narrow holding "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 494-495, stops there. It does not mean that all agreements to divide MRP are prohibited by the USFSPA. Neither does it limit the spouses' freedom to agree to divide MRP that is properly divisible. An agreement to divide MRP is ineffective only if it includes disability benefits, as did the agreement in *Mansell*.

In sum, the state law of contracts was not altered by *McCarty*, the USFSPA, or *Mansell*. Multiple state courts have agreed. *E.g.*, *Shelton v. Shelton*, 119 Nev. 492, 493, 78 P.3d 507, 508 (2003), *cert. denied*, 541 U.S. 960 (2004) ("We conclude that, although courts are prohibited by federal law from determining veterans'

---

[3] The USFSPA only prohibits contracts between a spouse and a third party: "Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay." *Mansell*, 490 U.S. at 590.

disability pay to be community property, state law of contracts is not preempted by federal law."); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. App. 2004), *review denied* ("*Mansell* does not prevent state courts from enforcing the stipulated provisions of a dissolution judgment."); *Krapf v. Krapf*, 439 Mass. 97, 108, 786 N.E.2d 318, 326 (2003) ("The judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Abernathy v. Fishkin*, 699 So.2d 235, 240 (Fla. 1997) ("while federal law prohibits the division of disability benefits, it does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay."); *In re Marriage of Stone*, 274 Mont. 331, 336, 908 P.2d 670, 673 (1995) (same).

Agreements to divide MRP are thus within the province of state domestic relations and contract law. Consequently, this Court has no jurisdiction over the Howell's settlement agreement, its incorporation in the Decree, or the family court's 2014 Order modifying that Decree to ensure that Sandra receive the benefit of her bargain.

Because *Mansell* does not prohibit agreements to divide MRP, it does not prevent the creation of a vested interest in MRP by such an agreement. John's argument that a spouse cannot have a contractually vested interest in unwaived MRP ignores basic contract law

and the importance of the timing of the agreement. As discussed, a service member and spouse are free to contract to divide total MRP before any waiver. Once they do so, the spouse has a vested interest and the service member cannot unilaterally act to affect that interest. If the service member later becomes disabled, he or she is not required to claim or accept disability benefits. But if he or she chooses to do so for the tax benefits, the earlier agreement implicitly requires that only the service member suffer the reduction in MRP. In other words, even though a service member has "an absolute right to waive MRP in order to receive disability pay," Br. 47, he or she has no right to do so and thereby cause his or her spouse to suffer a reduction of MRP in breach of a promise to that spouse. While a waiver of MRP during marriage will reduce the value of the community interest, a waiver after an agreement to divide MRP cannot reduce a contractually vested interest.

As the Arizona Supreme Court stated, "Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John." Pet. App. 12a. Sandra's vested interest is critical because she agreed to receive spousal maintenance for only a limited period of time – until John retired and she would receive her share of the MRP. Pet. App. 43a. Had she known that John could later unilaterally reduce her interest, no doubt she would have made a different bargain. Also, the parties' agreement to terminate spousal maintenance and substitute MRP, and the family court's later finding that "[Sandra] was dependent on and expecting [one-half of

MRP]," Pet. App. 33a, indicate that the parties did not intend by their agreement that Sandra's dollar share of MRP could be reduced.

Whatever the reason for Congress' decision to shelter from community property law that portion of military retirement pay previously waived to receive veterans' disability payments, it cannot extend to MRP that has been divided, and thus vested in the non-military spouse, before any waiver. Because the USFSPA lacks any positive provision compelling such an extension, any court that would so apply the USFSPA would thereby deprive the spouse of vested property without due process.

Finally, John's hypothetical comparing two divorced, disabled veterans, one who receives MRP and the other who does not, Br. 47-48, is seriously flawed. First, the MRP difference makes one veteran an apple and the other an orange. Second, the hypothetical is not relevant to this case because the veteran receiving MRP is not bound by an agreement to share it with a former spouse. Third, both veterans receive and get to keep their disability benefits. An indemnification order regarding MRP does not affect the first veteran's actual receipt of disability benefits. Finally, the hypothetical does not consider the first veteran's other assets that could be used to satisfy the indemnification order.

2. Indemnification orders do not conflict with the purposes and objectives of the USFSPA.

(a) The primary purpose is to benefit the non-military spouse.

The primary purpose of the USFSPA was to authorize state courts to again treat MRP as community property and thereby allow its division for the benefit of a veteran's spouse. Such treatment had been stopped by *McCarty*, which concluded that "the application of community property law conflicts with the federal military retirement scheme. . . ." 453 U.S. at 223. The USFSPA was intended to "have the effect of reversing" *McCarty*. H.R.Conf.Rep. No. 97-749, p. 165 (1982).

The USFSPA's primary purpose is expressly stated in the legislative history:

> The primary purpose of the bill is to remove the effect of . . . *McCarty v. McCarty*. The bill would accomplish this objective by permitting . . . courts, consistent with the appropriate laws, to once again consider military retirement pay when fixing the property rights between the parties to a divorce. . . .

S.Rep. No. 97-502, p. 1 (1982).

That purpose is manifested in the grant of authority to treat MRP as community property. 10 U.S.C. § 1408(c). Needless to say, fulfillment of that purpose only benefits a service member's spouse. It does not

benefit the service member, whose MRP would be separate property but for the USFSPA.

The USFSPA's intent to benefit the spouses of service members is also demonstrated by its other provisions. One provides that some former spouses receive their payments of MRP directly from the military. 10 U.S.C. § 1408(d)(1). Other provisions in the original enactment authorized participation in a service member's surviving dependent's annuity plan, and provided medical benefits and commissary and post exchange privileges. Pub. L. No. 97-252, Title X, §§ 1003-1005, 96 Stat. 730 (1982).[4] The intent to benefit spouses is emphasized by the law's title – the Uniformed Services Former Spouses' Protection Act.

In contrast, protection of a veteran's disability benefits was not an expressly stated objective of the USFSPA; likely because there was no need to do so. The USFSPA excludes from division as community property MRP that had already been waived to receive disability benefits, but it does not otherwise explicitly protect disability benefits from division on divorce. The likely reason for both – what the USFSPA did and did not do – is that Congress understood military disability benefits to be separate property, a "personal entitlement" payable to the member, just as MRP was under *McCarty*. Thus, John is incorrect in his assertion that

---

[4] Those benefits may have changed over time, but any subsequent amendments are irrelevant to the current issue. *See* 10 U.S.C. §§ 1408(h)(9)(a), 1447, 1448, 1450, and 1072.

"the statute's purpose is to ensure that veterans keep all of their disability pay." Br. 26.[5]

(b) No conflict exists.

Enforcing or modifying a divorce decree to require a veteran to honor an agreement to share MRP with a former spouse does not conflict with the purposes and objectives of the USFSPA. As previously noted, the *primary* purpose of the USFSPA was to re-authorize the division of MRP for the benefit of former spouses. If a state's law treats MRP as community property and a state court decrees a division, it follows that the beneficial objective of the USFSPA is furthered by any subsequent court order necessary to maintain and effect the division.

An indemnification order certainly does not do "major damage" to "clear and substantial" federal interests. Indeed, little federal interest remains after the service member retires, and what interest does remain is neither substantial nor damaged.

The purposes of the nondisability retirement systems of the various armed services are, in summary, to recruit, retain, retire, and provide for members. *McCarty*, 453 U.S. at 212-213. Once a member retires, all of those federal interests, except the last, cease. While the interest in providing for retired members

---

[5] This Court has said that "the Veteran's Benefits provisions of Title 38 [do not] indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support." *Rose v. Rose*, 481 U.S. at 636.

continues, it is not damaged by any division of MRP because Congress has authorized its division.

An eligible service member is "entitled to retired pay." *E.g.*, 10 U.S.C. §§ 3929 (Army), 6325-6326 (Navy), 8929 (Air Force). If that service member lives in a state that treats MRP as community property, the spouse has an interest in it. When MRP is divided by decree, whether pursuant to a settlement agreement or litigation, each spouse's interest is thus defined. If the retired member later elects to waive MRP to receive disability benefits and the state court orders the member to indemnify the spouse for the reduction in MRP, the federal interest of providing for the retired member is not damaged.

In fact, the member is better off because the disability benefits are not taxed. To use this case as an example, John receives one-half of the reduced MRP and all of the disability benefits. After his "make-up" payment to Sandra, John is left with the same gross amount as her, but he pays no tax on the disability benefits portion.

Even if a purpose of the USFSPA was to ensure that veterans keep all of their disability pay, an indemnification order does not conflict with that purpose. John's conflict argument is based on nothing more than the mere fact that the amount to be reimbursed to Sandra is equal to one-half of the amount of MRP he waived to receive disability benefits. But those amounts are necessarily the same. Therefore, John's economic equivalent premise is a fiction that does not

support his conclusion that the order effects a division of disability benefits. In fact, as John admits, he keeps all of his disability benefits. "[T]he decree (sic) did not directly interfere with [John's] receipt of his disability pay. . . ." Br. 24.[6]

Moreover, John's conclusion is wrong because the indemnification order does not require reimbursement from any particular source of funds. In the words of two learned commentators, "[t]he retiree . . . is free to reimburse the former spouse with any income or assets at his disposal. Thus, there is no implicit division of the disability benefits in contravention of *Mansell v. Mansell*." Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. AM. ACAD. MATRIM. LAW. 147 (2011).[7] As John admits, indemnification orders can be satisfied out of the veteran's "general assets." Br. 18.

And as the Arizona Supreme Court correctly observed, "Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of MRP" and the "Order did not divide the MRP subject to the VA waiver . . . or direct him to pay any amount to Sandra from his disability pay." Pet. App. 7a. Other states agree that the "make-up" payment can come from assets other than

---

[6] When the sentence is read in context, the "decree" undoubtedly refers to the indemnification order.

[7] Sullivan is a Fellow of the American Academy of Matrimonial Lawyers. Raphun, an attorney, is also a Colonel in the United States Army Reserve.

disability benefits. *E.g.*, *Hayward v. Hayward*, 868 A.2d 554, 561 (Pa. Super. Ct. 2005); *Whitfield v. Whitfield*, 373 N.J. Super. 573, 862 A.2d 1187 (2004); *Troxell v. Troxell*, 28 P.3d 1169, 1172 (Okla. Civ. App. 2001); *Krapf v. Krapf*, 439 Mass. 97, 108, 786 N.E.2d 318, 326 (2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (App. 1993) (increasing percentage of MRP award); *Owen v. Owen*, 14 Va. App. 623, 627, 419 S.E.2d 267, 270 (1992).

The conflict imagined by John is contradicted by the logical scope of the intent of Congress. The USFSPA only placed previously waived MRP outside the bounds of community property and thus beyond the reach of state courts. Given the concern of Congress for the former spouses of retired service members, it could not have intended to allow a service member to obtain a divorce decree dividing MRP, then apply for disability benefits and, when those benefits are granted, waive MRP, leaving the former spouse without a state court remedy against non-disability benefit assets.

(c) *Wissner*, *Ridgway*, *Hisquierdo*, and *Hillman* are not controlling.

Contrary to John's position, *Wissner v. Wissner*, 338 U.S. 655 (1950), *Ridgway v. Ridgway*, 454 U.S. 46 (1981), *Hisquierdo*, and *Hillman* do not resolve this case. Each is meaningfully distinguishable, most importantly because none of them involved an agreement

between the service member and a spouse, as does this case.

Wissner, *Ridgway*, and *Hillman* each involved the designation of life insurance beneficiaries and gave priority to the insured service member's or federal employee's choice of beneficiary. None of those cases involved a divorce. Had the insured and the spouse agreed in the context of divorce that the member would designate the spouse as the beneficiary, the analysis and result would no doubt have been different. Just as this Court has respected the insured's "freedom of choice" of beneficiary to ensure that insurance proceeds will actually belong to the designated beneficiary, *Hillman*, 133 S.Ct. at 1952, this Court must also respect John's "freedom of contract" to divide MRP with Sandra.

Wissner, *Ridgway*, and *Hillman* also support Sandra by analogy. Pursuant to her settlement agreement with John, she was as to one-half of his MRP as a designated beneficiary is to a decedent's life insurance proceeds. Thus, what she bargained for must also actually belong to her.

Although *Hisquierdo* was a divorce case, the parties did not agree to any division of the husband's railroad retirement benefits. Instead, whether those benefits were community property was disputed and litigated. Therefore, like *Wissner*, *Ridgway*, and *Hillman*, *Hisquierdo* is also distinguishable from this case by the absence of a decisive agreement between the parties.

Hisquierdo is further distinguished by a "critical" provision of the Railroad Retirement Act. It contains "a flat prohibition against attachment and anticipation," 439 U.S. at 582, that "plays a most important role in the statutory scheme," *id.* at 583-584. That provision, 45 U.S.C. § 231m, states that:

> [N]otwithstanding any other law of the United States, or of any State, . . . no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

That provision, as this Court held, conflicted with the community property interest sought by the wife. 439 U.S. at 590. But that provision has no counterpart in the USFSPA.

III. THE USFSPA DISTINGUISHES BETWEEN DIVISIONS OF MRP MADE BEFORE AND AFTER A WAIVER OF MRP.

The USFSPA authorizes state courts to divide a service member's "disposable retired pay" with his spouse in accordance with state law. 10 U.S.C. § 1408(c)(1). "Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled" minus certain deductions. The relevant deduction in this case is any amount "deducted from the retired pay . . . as a result of a waiver of retired pay . . . to receive [disability] compensation. . . ." 10 U.S.C. § 1408(a)(4)(C).

Those provisions allow a state court to divide two distinct categories of MRP: (1) total MRP and (2) total MRP less the amount waived to receive disability benefits. Each category has a temporal character relative to any waiver. The first is MRP before any waiver and the second is MRP after a waiver. As to the second category, when the statutory definition speaks of MRP less an amount "deducted . . . as the result of a waiver," it does so in the past tense in reference to a waiver that has occurred. As this Court held in *Mansell*, "the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay *that has been waived* to receive veterans' disability benefits," 490 U.S. at 494-495 (emphasis added).

Timing of any division of MRP is of great consequence. Timing determines what MRP can be divided. How the available MRP is divided then determines the extent of the state law property right of the nonmilitary spouse.

In Arizona, MRP is "a form of deferred compensation." Pet. App. 12a.[8] "Thus, the MRP earned during the parties' marriage belong[s] to the community and [is] divisible upon dissolution of the marriage." *Id.* Once divided, the decree creates "an immediate right to future payment." Pet. App. 13a. The decreed share of MRP is

---

[8] *Accord Barker v. Kansas*, 503 U.S. 594, 603 (1992) ("the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services"), citing *McCarty*.

therefore "vested as [the spouse's] property right. . . ." *Id.*

Because Congress authorized the States to divide MRP according to state law, the result, at least in Arizona, is that when total MRP is divided before any waiver, the non-military spouse has "a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [the veteran]." Pet. App. 12a.[9]

Post-divorce waivers of MRP cannot affect a spouse's vested right. And state court orders, whether in the nature of enforcement or modification of the decree, to remediate the division of property that the USFSPA authorized but the veteran disrupted, do not violate the USFSPA. Indeed, such orders are consistent with the primary purpose of the USFSPA to protect and benefit former spouses.

As the Arizona Supreme Court noted, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP." Pet. App. 8a. A direct prohibition is necessary to pre-emption of the states' authority to remedy a veteran's unilateral reduction of an ex-spouse's vested interest in property. Because the prohibition in

---

[9] Whether a veteran in Arizona can, during marriage, unilaterally waive a portion of the marital community's interest in MRP, and what the spouse's interest in the remaining MRP would be if they later divorce, are different and unanswered questions that are not before this Court.

the USFSPA is expressly limited to the division of waived MRP, but does not positively pre-empt relief to rectify a post-decree dilution of an ex-spouse's vested share of MRP, it does not preclude state court indemnification orders that do not divide disability benefits.

The analysis simply ends there. Accordingly, it is unnecessary to further address John's arguments and hypotheticals in section II.A of his brief.

IV. STATE COURTS MUST HAVE FLEXIBILITY TO FASHION EQUITABLE REMEDIES APPROPRIATE TO EACH CASE.

John sought disability benefits some thirteen years after his divorce from Sandra and the division of their marital community estate. Sandra did not move to enforce the decree for eight years more. At either point in time it was likely impractical, if not impossible, to equitably redistribute the estate in kind to account for John's unilateral waiver of MRP awarded to Sandra. The only practical remedy available to the family court was a monetary indemnification order.

The indemnification order herein making John "responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability," Pet. App. 28a, does not divide or otherwise directly affect John's disability benefits. As the Arizona Supreme Court noted, the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay." Pet. App. 7a.

John can simply indemnify Sandra from his other assets. "'Nothing' in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of gross retirement pay." *Mansell*, 490 U.S. at 601 (O'Connor, J., dissenting.) No finding was made that John has no other assets, and he did not make that argument. Nor could he because he has at least his own share of the MRP.

Although the indemnification order did not direct John to pay Sandra from his share of the MRP, such an order would not be prohibited by the USFSPA:

> Nothing in this section [10 U.S.C. § 1408] shall be construed to relieve a member of liability for . . . payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under . . . [the direct payments mechanism] has been paid.

10 U.S.C. § 1408(e)(6).

That "savings clause" defeats "any inference that the [USFSPA's] federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Mansell*, 490 U.S. at 590. Thus, a state court order can

properly be directed at MRP not being paid directly to Sandra, in other words, MRP paid to John. At least one state court has relied on the savings clause to support an order of indemnification from assets other than disability benefits. *Troxell v. Troxell*, 28 P.3d at 1171 (Okla. Civ. App. 2001).

John misapprehends Sandra's savings clause argument, which is different than the argument made by Mrs. Mansell and rejected by this Court. *Mansell*, 490 U.S. at 590. Indeed, *Mansell*'s interpretation of the savings clause, *id.*, directly supports Sandra's position that the state court can order John to pay her from his share of the MRP. Therefore, Sandra does not invite the Court to "overrule *Mansell*'s interpretation of the savings clause." Br. 51. Neither does she argue that the savings clause authorizes "state courts to treat waived MRP as divisible property." *Id.* John is mistaken in attributing those arguments to Sandra.

CONCLUSION

The Arizona Supreme Court's decision is correct and should be affirmed.

Respectfully submitted,

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent